

JAN 16 1991

POLLUTION CONTROL
- CASE NO. 90-170 -

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

HERMAN F. RUX, JR., MERWIN C.
HOUGER, RICHARD DREGER & SONS;
EVERETT J. COLE; ROBERT ROSMAN;
WILBUR SECURITY COMPANY (MCPHERSON)
WILLIAM DREGER & SONS, RICHARD
QUIRK; PATRICK QUIRK; CLARENCE
WAGNER; RANDY DREGER; AUGUST DREGER
RETTKOWSKI BROTHERS; JOHN C. WATSON

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT
OF ECOLOGY; JOHN ROSMAN; WILLIAM E.
ROSMAN, KEITH NELSON, CLARENCE
WAGNER; AND ROBERT J. BAUER,

Respondents.

and

SINKING CREEK SURFACE WATER
PROJECT,

Respondent/Intervenor

PCHE Nos. 90-170, 90-172,
90-173, 90-174,
90-175, 90-176,
90-178, 90-181,
90-182, 90-183,
90-185, 90-186,
90-188, 90-197

ORDER STAYING ENFORCEMENT
OF DOE REGULATORY ORDERS


THIS MATTER coming on for hearing on October 11, 1990, before the undersigned upon request of several Appellants for the entry of an order staying the Department of Ecology's ("DOE") regulatory orders and the undersigned having fully reviewed and being fully advised, after hearing, has determined that a stay should be granted pending final determination of the matters. On the

ORDER STAYING ENFORCEMENT OF
WDOE REGULATORY ORDERS -- 1


1 basis of the previously entered Findings of Fact and Conclusions
2 of Law, it is

3 ORDERED pursuant to RCW 43.21B.320 that the regulatory orders
4 issued by the DOE, from which Appellants have appealed, are stayed
5 until there is entered a final determination.

6 DATED: ~~October 11, 1990~~ February 8, 1991.
7 Effective October 11, 1990.

8 
9 William A. Harrison,
Administrative Law Judge

10 Presented by:

11 
12 Charles A. Kimbrough
13 Attorneys for Appellants
14 Wilbur Security and
McPherson

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27 ORDER STAYING ENFORCEMENT OF
28 WDOE REGULATORY ORDERS -- 2

JAN 16, 1991

FILED IN COURT
CLERK'S OFFICE

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

HERMAN F. RUX, JR., MERWIN C.
HOUGER, RICHARD DREGER & SONS;
EVERETT J. COLE; ROBERT ROSMAN;
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PCHB Nos. 90-170, 90-172,
90-173, 90-174,
90-175, 90-176,
90-178, 90-181,
90-182, 90-183,
90-185, 90-186,
90-188, 90-197

FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE:
STAY OF DOE ORDER

1. HEARING - OCTOBER 11, 1990

1.1 Jurisdiction. The Washington State Department of Ecology
(hereinafter "DOE") issued a series of regulatory orders directed
to Appellants, per RCW 43.27A.190, barring each from withdrawal of
ground waters in accordance with their ground certificates that
DOE had earlier approved for beneficial uses of crop production,
including grains and cattle, after October 1, 1990. Appellants

FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE: STAY OF WDOE ORDERS -- 1

ORIGINAL

LAW OFFICES
FOREMAN KRAFT & PRINCE
2101 112TH NE
BELLEVUE, WASHINGTON 98004

1 appealed to the Pollution Control Hearing Board ("PCHB") pursuant
2 to RCW 43.12B.320 and several filed motions to stay the DOE
3 orders pending a final decision on the merits.

4 1.2 Administrative Appeals Judge. William A. Harrison.

5 1.3 Hearing on Temporary Stay. A hearing was heard on
6 October 11, 1990.

7 1.4 Appearances. Appellants, Wilbur Security Company and Tom
8 and Jack McPherson appeared by and through Charles A. Kimbrough,
9 Herman Rux appeared through their attorney Robert D. Dellwo, Craig
10 and Gale Rettkowski, Richard Dreger, Richard Quirk and Everett
11 Cole appeared by and through their counsel Terry Snow, all other
12 Appellants were Pro Se and Respondents Department of Ecology
13 appeared by Assistant Attorney General Thomas McDonald,
14 Respondents John Rosman, William E. Rosman, Keith Nelson, Clarence
15 Wagner and Robert Bauer, Pro Se, and Respondent Intervenor Sinking
16 Creek Surface Water Project, Inc. appeared by and through its
17 counsel Steven K. Eugster.

18 1.5 Evidence. The Hearing Judge considered the Notices of
19 Appeal, including request for stay, the Affidavits and
20 Declarations of John Rosman, Bill Rosman, Harold Roloff, Keith
21 Nelson, Theodore M. Olson, Linton L. Wildrick, Jack McPherson,
22 William Coppenaver, Mark Utting, Ph.D., Dan Williams, John
23 Anderson, Kenneth McMillan, Randall Liddel, Charles A. Kimbrough,
24 Craig and Gale Rettkowski, Richard Dreger, Richard Quirk and
25 Everett Cole, oral testimony of individual appellants, legal
26 briefs, written and photographic exhibits shown by the speakers,

27
28 FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE: STAY OF WDOE ORDERS -- 2

1 PCHB file in this matter, and the argument of each counsel.
2 Having considered the foregoing, the undersigned makes the
3 following:

4 II. FINDINGS OF FACT

5 2.1 The facts of this dispute extend into the past starting
6 with the early settlement of this area. During that time, land
7 was developed, and waters put to beneficial use for agriculture.
8 Over the years the land has been bought and sold with the waters
9 being regulated by government to ensure their application for
10 beneficial use and orderly development. The first of the
11 agricultural development in this basin occurred in early times,
12 involving the raising of crops and livestock, which apparently
13 co-existed cooperatively using available surface waters from
14 Sinking Creek, springs and ponds, and ground water from shallow
15 wells to permit agricultural production and human existence. In
16 approximately the early 1950's, technology advanced where deeper
17 wells could be drilled to obtain waters to irrigate the lands to
18 increase both crop and livestock production. At present, it
19 appears that before, where there was ample surface and ground
20 water for all, there are now disputes between the various users of
21 water in the Sinking Creek Basin and contentions by some that
22 there are insufficient quantities of water for all the desired
23 uses. The waters of the State of Washington are a public resource
24 regulated under statutory authority by the DOE. DOE has the
25 responsibility to regulate the uses of water in accordance with
26 water rights laws of the State of Washington.

27 FINDINGS OF FACT AND CONCLUSIONS OF LAW
28 RE. STAY OF WDOE ORDERS -- 3

1 2.2 The irrigation wells, area of regulations and individual
2 appellants are identified in the various regulatory orders issued
3 by DOE and are on file herein.

4 2.3 Appellants have produced facts which
5 demonstrate that the regulatory orders of DOE, unless stayed, will
6 cause irreparable harm. Neither the DOE nor respondents has shown
7 a substantial probability of success on the merits or likelihood of
8 success on the merits and an overriding public interest which
9 justifies denial of the request for a stay. These facts are amply
10 demonstrated in the Affidavits, Declarations, legal briefs and
11 oral testimony. By way of example, if the stay is not granted,
12 William Copenhaver's Declaration, pp. 1 and 2, cites direct
13 out-of-pocket losses of \$26,750.00 and probable greater dollar
14 amounts of lost profits. Jack McPherson's Declaration, page 7,
15 supports a total loss of \$150,000.00. This range of economic
16 losses is realistic based on the information in other affidavits
17 and declarations and are clear examples of the very substantial
18 economic losses which will be sustained by most, if not all,
19 appellants, and many other members of the Wilbur and Creston
20 community. An additional example is the Declaration of Jack
21 McPherson, pp. 6 and 7, which illustrates that if a transition
22 from deep well irrigation farming must be made to dryland farming,
23 a period of transition is necessary in order to allow dryland
24 farming to work in the required cycles. An abrupt cessation of
25 irrigation farming is not only inconsistent with irrigated
26 farming, but dryland farming as well.

27 FINDINGS OF FACT AND CONCLUSIONS OF LAW
28 RE: STAY OF WDOE ORDERS -- 4

1 2.4 The DOE letters preceding the issuance of the orders herein
2 indicated that some persons might be regulated, but did not advise the
3 parties that any, let alone all, deep well irrigation would be
4 completely stopped. There was ambiguous notice given to Appellants by
5 the letters which predated the regulatory orders. Appellants, in
6 good faith, believed that any regulation was likely to be a partial
7 reduction or change in quantity, or changes in casing or similar
8 requirements, or perhaps requiring a cutback of some irrigation. It
9 was not reasonable for them to assume that all irrigation would be
10 abruptly halted. While 1990 may require a different farming and water
11 use practice than 1950, the conversion from one type of practice to
12 another should not occur in the time it takes to mail a letter or
13 order.

14 2.5 It is appropriate, since this matter will be litigated for
15 nearly a year, for an interim time period to allow an opportunity to
16 plan for a change in all farming practices, some of which have
17 existed for nearly 430 years. All parties involved should plan during
18 that time period for any changes that may be required as a result of
19 the final determination herein. Appellants should not conduct
20 business as usual in 1991. They should irrigate with an understanding
21 that irrigation may or may not be allowed in 1992.

22 III. CONCLUSIONS OF LAW

23 On the basis of the foregoing Findings of Fact, the undersigned
24 makes the following conclusions of law:
25
26

1 3.1 Appellants have made a showing that the WDOE regulatory
2 orders will cause them to suffer irreparable harm if a stay is not
3 granted. That showing has not been rebutted by Respondents. The WDOE
4 has not shown a substantial probability of success on the merits. The
5 WDOE has shown a likelihood of success on the merits, but has not
6 shown an overriding public interest which would justify denial of the
7 stay. Failure to show overriding public interest is based upon the
8 numbers, the duration and the community impact of deep irrigation
9 wells in the area.
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DATED: ^{February}~~October~~ 8, 1998.
Effective October 11, 1990.

William A. Harrison

William A. Harrison,
Administrative Law Judge

Presented by:

Charles A. Kimbrough
Charles A. Kimbrough/
Attorneys for Appellants
Wilbur Security and
McPherson

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FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE: STAY OF WDOE ORDERS -- 7

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

HERMAN F. RUX, JR., MERWIN C.
HOUGER, RICHARD DREGER & SONS,
EVERETT J. COLE, ROBERT ROSMAN,
WILBUR SECURITY COMPANY
(McPherson), WILLIAM DREGER &
SONS, RICHARD QUIRK, PATRICK
QUIRK, CLARENCE WAGNER, RANDY
DREGER, AUGUST DREGER,
RETTKOWSKI BROTHERS, JOHN C.
WATSON,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT
OF ECOLOGY, JOHN ROSMAN,
WILLIAM E. ROSMAN, KEITH NELSON,
CLARENCE WAGNER, and ROBERT J.
BAUER,

Respondents,

and

SINKING CREEK SURFACE WATER
PROJECT and JAMES F. ROSMAN,

Respondents-Intervenor.

PCHB Nos. 90-170, 90-172, 90-173
90-174, 90-175, 90-176
90-178, 90-181, 90-182
90-183, 90-185, 90-186
90-188, 90-197

ORDER DENYING MOTION TO
QUASH CEASE AND DESIST ORDERS

The following were considered:

1. Motion to Quash Cease and Desist Orders, Memorandum in
Support, and related papers filed September 20, 1991.

2. Appellant Houser's Joinder in Motion to Quash Cease and
Desist Orders filed September 23, 1991.

3. Motion and Brief to Dismiss Action and DOE's Orders for Lack
of Jurisdiction filed October 2, 1991.

ORDER DENYING MOTION TO
QUASH CEASE AND DESIST ORDERS
PCHB Nos. 90-170, etc.

(1)

1 4. Response to Motion to Quash and Motion to Dismiss and related
2 papers filed October 11, 1991.

3 5. Sinking Creek Surface Water Project's Memorandum of
4 Authorities in Opposition to Motions to Quash and Dismiss filed
5 October 11, 1991.

6 6. Respondent William E. Rosman's Motion and Brief in Opposition
7 to Appellants' Motions to Quash Ecology's Orders or to Dismiss this
8 Proceeding filed October 14, 1991.

9 7. Reply Memorandum in Support of Motion to Quash Department of
10 Ecology's Cease and Desist Orders filed October 16, 1991.

11 8. Wilbur Security's Reply Re: Motion to Dismiss filed October
12 17, 1991, together with the records and file herein, and the oral
13 argument of counsel on October 14, 1991, at Spokane, before Judge
14 William A. Harrison. Members of the Board have read the transcription
15 of the oral argument.

16 This case is a dispute over water rights. It concerns Sinking
17 Creek in Lincoln County. The case comes to us upon appeal by
18 irrigators from an order of the State Department of Ecology that they
19 cease and desist water appropriation in respect of the existing water
20 rights of cattlemen. The cattlemen assert riparian and other rights.
21 The irrigators assert appropriative rights. Each disputes the others'
22 rights.

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25 ORDER DENYING MOTION TO
26 QUASH CEASE AND DESIST ORDERS
27 PCHB Nos. 90-170, etc.

1 The appellant-irrigators now move to quash the state's cease and
2 desist orders on three separate grounds:

3 1. That the State Department of Ecology exceeded its statutory
4 authority in issuing the cease and desist orders.

5 2. That the cease and desist orders denied due process of law.

6 3. That the cease and desist orders are invalid on their face.

7 We now take these up in turn.

8 I. Whether the State Department of Ecology exceeded its
9 statutory authority in issuing the cease and desist orders?

10 The appellant-irrigators assert that the Department of Ecology
11 lacks the authority or the jurisdiction to determine priority among
12 disputed water rights. They assert that the only statutory authority
13 for the adjudication of water rights vests jurisdiction in the
14 superior courts of the respective counties affected. RCW
15 90.03.110-.240. Lastly, they contend that Ecology can regulate only
16 those water rights set through a general adjudication, a private
17 lawsuit, consent or the priority dates of water right certificates.
18 "Memorandum in Support of Motion to Quash," p. 6, lines 7 through 12
19 and 25 through 31. "Motion and Brief to Dismiss Action and DOE's
20 Orders for Lack of Jurisdiction," p. 14, lines 8-14. Wilbur
21 Security's Reply Re: Motion to Dismiss, p. 16, lines 16-23. For the
22 reasons which follow, we disagree.

23 The Director of the Department of Ecology "shall regulate and
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26 ORDER DENYING MOTION TO
27 QUASH CEASE AND DESIST ORDERS
PCHB Nos. 90-170, etc.

(3)

1 control the diversion of water in accordance with the rights
2 thereto." RCW 43.21A.064(3). This statutory authority is plenary.
3 It lacks any language which would confine the director's duty to only
4 those rights decreed in a general adjudication under the statutory
5 form of action set forth at RCW 90.03.110-.240 or private lawsuit or
6 consent or the priority dates of water rights certificates. We
7 decline to add such a limitation.

8 Moreover, the statute authorizing the type of orders now on
9 appeal, RCW 43.27A.190 provides plenary power, also. It authorizes
10 the department to issue regulatory orders " . . . whenever it appears
11 to the department . . . that a person is violating or is about to
12 violate any of the provisions" of the water codes, Chapters 90.03 and
13 90.44 RCW. Again, this statutory authority is not confined to the
14 protection of only those rights decreed in a general adjudication or
15 as otherwise urged by appellants.

16 Both RCW 43.21A.064(3) and RCW 43.27A.190 are akin to RCW
17 90.03.070 which grants power to Ecology personnel known as water
18 masters:

19 *It shall be the duty of the water master, acting*
20 *under the direction of the department, to divide in whole*
21 *or in part, the water supply of his district among the*
22 *several conduits and reservoirs using said supply,*
23 *according to the right and priority of each.*

24 Again the authority is plenary and not limited to only those rights
25 decreed in a general adjudication or as otherwise urged by appellants.

26 ORDER DENYING MOTION TO
27 QUASH CEASE AND DESIST ORDERS
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(4)

1 When the Legislature desires to confine an official's authority
2 to only adjudicated rights it so states expressly:

3 Where water rights of a stream have been
4 adjudicated a stream patrolman shall be appointed by
5 the director of the department of ecology upon
6 application of water users having adjudicated water
rights in each particular water resource making a
reasonable showing of the necessity therefore . . .
RCW 90.08.040 (emphasis added.)

7
8 We will not read into a statute matters which are not there nor
9 modify a statute by construction. See King County v. Seattle, 70
10 Wn.2d 988, 991, 425 P.2d 887 (1967). Ecology's authority under RCW
11 43.21A.064(3), RCW 43.27A.190 and RCW 90.03.070, is not limited to
12 regulation of only those water rights established by a general
3 adjudication under RCW 90.03.110-.240 or private lawsuit or consent or
the priority dates of water rights certificates.

14 Our conclusion in this regard is buttressed by case law. In Funk
15 v. Bartholet, 157 Wash. 584, 289 Pac. 1018 (1930) the State Supreme
16 Court had occasion to review a challenge to a water appropriation
17 permit granted by the Supervisor of Hydraulics (Ecology's predecessor)
18 to a public service corporation for development of Yale Reservoir in
19 Clark County. One George H. Funk had appealed the permit to superior
20 court. Mr. Funk asserted that development of the reservoir would
21 flood his timberlands, and sought compensation. The superior court
22 denied Funk's motion to join the public service corporation and
23 dismissed. In affirming the dismissal, the Supreme Court stated:

25 ORDER DENYING MOTION TO
26 QUASH CEASE AND DESIST ORDERS
27 PCHB Nos. 90-170, etc.

(5)

1 It is true that the supervisor is called upon to
2 tentatively determine, preliminary to the granting of
3 permits, some questions of more or less public interest,
4 one of which is as to whether or not there is any
5 unappropriated water available for appropriation, and
6 another of which is as to whether or not any further
7 permitted appropriation will conflict with existing
8 rights. (emphasis added.)

9 Of course, this tentative determination was made without either
10 the general adjudication decree or decree of a private lawsuit or
11 other requisites urged by appellants to be necessary here. The
12 Court's conclusion has been repeated in Stempel v. Department of Water
13 Resources, 82 Wn.2d 109, 509 P.2d 166 (1973). The appellants
14 distinguish between Ecology's powers prior to issuance of a water
15 right permit, as in Funk, and the situation here involving orders that
16 curtail certain existing rights in respect of others. Yet there is
17 nothing in Ecology's statutory authority for the regulatory order
18 situation that so limits that authority, as we have already
19 concluded. Moreover, our own precedent includes Williams v.
20 Department of Ecology, PCHB NO. 86-63 (1986) in which we concluded
21 that:

22 . . . tentative decisions as to the validity of
23 unadjudicated rights must be made in considering
24 enforcement action. p.11 (emphasis added.)

25 That case involved an order curtailing the existing unadjudicated
26 rights of Mr. Williams in respect of a minimum flow requirement. Such
27 a flow requirement functions as an appropriation. Williams, at

1 p. 10. Thus we have already concluded contrary to appellants' claim
2 that Ecology can only consider adjudicated water rights in enforcement
3 actions. See also Pitts v. Department of Ecology, PCHB No. 85-146
4 (1986) reaching the same conclusion with regard to Pitts'
5 unadjudicated federal water rights claim under the Winters doctrine.
6 This was also in the context of enforcement action by Ecology. Accord
7 Brownell v. Department of Ecology, PCHB NO. 85-135 (1986) MacKenzie v.
8 Department of Ecology, PCHB 77-70 (1979), and Riddle v. Ecology, PCHB
9 No. 77-133 (1978). We conclude that Ecology has statutory authority
10 to make a tentative determination of competing water rights in
11 connection with its enforcement orders even where such rights are not
12 decreed in a general adjudication under RCW 90.03.110-.240 or a
13 private lawsuit or by consent or by the priority dates of water rights
14 certificates.

15 Lastly, the appellant-irrigators assert that:

16 *The only alleged basis for DOE's Orders*
17 *(adjudication or prioritization of competing water*
18 *right claims) is outside DOE's statutory authority and*
outside the Board's statutory authority to review.

19 "Motion and Brief to Dismiss Action and DOE's Orders for Lack of
20 Jurisdiction", p. 21, lines 17 through 20.

21 We have previously concluded that Ecology has statutory authority
22 to make a tentative determination of competing water rights in
23 connection with its enforcement orders. We turn now to our role in
24 review of these orders.

25 ORDER DENYING MOTION TO
26 QUASH CEASE AND DESIST ORDERS
27 PCHB Nos. 90-170, etc.

1 The effect of Ecology's orders and appellants' appeal is to
2 commence an evidentiary hearing before the Board. We can reach no
3 conclusion concerning the relative merits of the claims or
4 certificates prior to a trial of the merits. We note in this regard
5 that the trial of the merits in this case is scheduled for 15 days
6 commencing on November 21, 1991. The preliminary witness lists of the
7 parties total in excess of 150 witnesses. Among these are
8 hydrogeologists, hydrologists, agricultural engineers, geo-chemists,
9 and other experts. Discovery has been vigorously pursued under court
10 rules adopted by our rules of procedure. See WAC 371-08-146. The
11 trial itself is subject to the State Administrative Procedure Act,
12 chapter 34.05 RCW. RCW 43.21B.160. The case will be tried to a Board
13 whose three members are qualified by experience or training in
14 pertinent matters pertaining to the environment. RCW 43.21B.020. One
15 member must be a lawyer. Id. The Administrative Appeals Judge must
16 be a lawyer. RCW 43.21B.005. The legislative purpose in creating the
17 Board is a uniform resolution of controversies by a tribunal
18 possessing special expertise. State v. Woodward, 84 Wash.2d 329, 525
19 P.2d 247 (1974). The Board is lodged within the State Environmental
20 Hearings Office which is an agency independent from Ecology. RCW
21 43.21B.005. The Board's purpose is to provide for a more expeditious
22 and efficient disposition of appeals with respect to Ecology orders.
23 RCW 43.21B.010.

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26 ORDER DENYING MOTION TO
27 QUASH CEASE AND DESIST ORDERS
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1 Until the Board's creation in 1970, appeals from state water
2 right permit decisions and enforcement orders went directly to
3 superior court. Former RCW 90.03.080 and RCW 43.27A.200. The
4 superior court determined water rights when such determinations were
5 necessary to the review of the decision or order appealed. See e.g.
6 In re: Martha Lake Water Co. No. 1, 152 Wash. 53, 277 Pac. 382
7 (1929). Such determinations were in addition to, and not prohibited
8 by, the statutory form of action for a general adjudication in
9 superior court found at RCW 90.03.110-.240. While the determination
10 of the Supervisor of Hydraulics (Ecology's predecessor) was deemed
11 tentative in Funk, supra, we see nothing tentative in the superior
12 court's former review of such determinations as in Martha Lake. In
13 Funk the appropriative permittee was not joined, apparently because
14 the appellant's claim related to compensation for flooding, not
15 impairment of a water right. In Martha Lake, however, both the
16 appropriative permittee and riparian appellant were before the court.
17 The court then finally decided the rights of each after trial. Accord
18 Brown v. Chase, 125 Wash. 542, 217 Pac. 23.

19 Since 1970, the Board has succeeded the superior courts as the
20 trial venue for determining water rights when such determinations are
21 necessary to the review of state water right permit decisions or
22 enforcement orders. RCW 43.21B.110(1)(b) and (c). Such
23 determinations by the Board, as previously by the superior courts, are
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1 in addition to and not prohibited by the statutory form of action for
2 a general adjudication at RCW 90.03.110-.240. The final decision of
3 the Board after trial is conclusive upon the issues and parties
4 therein. A person aggrieved or adversely affected by the Board's
5 decision may appeal, under the Administrative Procedure Act, to
6 superior court. RCWS 34.05.530, RCW 43.21B.190.

7 In summary, Ecology has not exceeded its statutory authority in
8 making a tentative determination of competing water rights in
9 connection with the appealed enforcement orders. Further, the Board
10 is within its statutory authority to review such determinations and
11 orders. The motions to quash the cease desist orders on grounds that
12 Ecology has exceeded its statutory authority should be denied.

13 II. Whether the cease and desist orders denied due process of
14 law?

15 The issue of due process of law has been briefed and presented by
16 the parties. In sum, the issue arises because Ecology followed the
17 statutory procedure for issuing its cease and desist orders found at
18 RCW 43.27A.190. That provision allows regulatory orders which . . .
19 "shall become effective immediately upon receipt by the person to whom
20 the order is directed . . . ", with ensuing right of appeal to the
21 Board. There is no provision in RCW 43.27A.190 for notice and
22 opportunity to be heard prior to the regulatory order becoming
23 effective. Ecology granted no notice or hearing prior to its orders
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25

26 ORDER DENYING MOTION TO
27 QUASH CEASE AND DESIST ORDERS
PCHB Nos. 90-170, etc.

1 now before us. Exhibits 3 and 6 to "Memorandum in Support of Motion
2 to Quash." The appellant-irrigators assert that the statutory process
3 followed by Ecology denies due process of law as guaranteed by the
4 U.S. Constitution, Amendments V and XIV as well as corresponding
5 language of the Washington State Constitution at Article I, Section
6 3. Despite the presentation of this issue, the Board has no
7 jurisdiction to resolve it:

8 *an administrative tribunal is without authority to*
9 *determine the constitutionality of a statute . . .*

10 Yakima Clean Air v. Glascam Builders, 85 Wn.2d 255, 257, 534 P.2d 33
11 (1975). The motions to quash the cease and desist orders on grounds
12 of denial of due process must therefore be denied for lack of
13 jurisdiction.

14 III. Whether the cease and desist orders are invalid on their face?

15 The cease and desist orders contain a preamble which states:

16 *The Order is issued under authority of RCW*
17 *43.27A.190.*

18 Exhibit 1 to "Response to Motion to Quash and Motion to Dismiss."
19 That statute, RCW 43.27A.190, authorizes the issuance of regulatory
20 orders whenever it appears to Ecology that:

21 *" . . . a person is violating or is about to violate*
22 *any of the provisions of the following:*

- 23 1. Chapter 90.03 RCW or
24 2. Chapter 90.44 RCW or
25 3. Chapter 86.16 RCW or
26 4. Chapter 43.37 RCW or
27 5. Chapter 43.27A RCW or

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PCHB Nos. 90-170, etc.

1 6. any other Chapter or statute relating to water
2 resources administered by the department; or
3 7. A rule or regulation adopted, or a directive or
4 order issued by the department relating to subsections
5 (1) through (6) of this section; the department may
6 cause a written regulatory order to be served . . . "
 The order shall specify the provision of the statute,
 rule, regulation, directive or order alleged to be or
 about to be violated . . . (emphasis added.)

7 Ecology's orders allege specifically that senior water rights are
8 being impaired by the groundwater withdrawal of appellants. Exhibit
9 1, supra, paragraphs 5, 6 and 7. This, in turn, would constitute a
10 violation of appellants' groundwater permits and certificates which
11 contain the condition that their rights are granted "subject to
12 existing rights." See Exhibit 11, supra.

13 The term "directive" is not specially defined. It is appropriate
14 to resort to dictionaries to ascertain the common meaning of a
15 statutory term. East v. King Co., 22 Wn. App 247, 253, 589 P.2d 805
16 (1978) and cases cited therein.

17 Websters Third New International Dictionary (1971) defines
18 "directive" in this context to mean:

19 *Something that serves to direct, guide and usually*
20 *impel toward an action, attainment or goal. A*
 pronouncement urging or banning action or conduct.

21 Applying this definition to the condition in appellants' permits which
22 makes their water rights "subject to existing rights," we conclude
23 that such is a "directive" within the meaning of RCW 43.27A.190.
24

25
26 ORDER DENYING MOTION TO
 QUASH CEASE AND DESIST ORDERS
27 PCHB Nos. 90-170, etc.

1 Finally, we conclude that the cease and desist orders, in stating that
2 senior rights are impaired, specified a directive alleged to be
3 violated. Of course, the directive "subject to existing
4 rights"relates to the water code, chapter 90.03 RCW. RCW 90.03.010.
5 See also RCW 90.44.020. As such, it is the type of directive
6 contemplated by RCW 43.27A.190(7). The motions to quash the cease and
7 desist orders on grounds that they are invalid on their face should be
8 denied.

9 WHEREFORE, IT IS ORDERED:

10 1. The motions to quash on grounds that Ecology exceeded its
11 statutory authority is denied.

12 2. The motions to quash on grounds of denial of due process is
13 denied for lack of jurisdiction.

14 3. The motions to quash on grounds that the orders are invalid
15 on their face is denied.

1 DONE at Lacey, Washington, this 1st day of November, 1991.

2 POLLUTION CONTROL HEARINGS BOARD

3 Harold S. Zimmerman
4 HAROLD S. ZIMMERMAN, Chairman

5 Judith A. Bendor
6 JUDITH A. BENDOR, Member

7 Annette S. McGee
8 ANNETTE S. M^CGEE, Member

9 William A. Harrison

10 WILLIAM A. HARRISON
11 Administrative Appeals Judge

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25 ORDER DENYING MOTION TO
26 QUASH CEASE AND DESIST ORDERS
27 PCHB Nos. 90-170, etc.

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